88-954

FILED
DEC 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1988

JULIUS LACZAY and JOLANDA LACZAY,

Petitioners,

vs.

ROSS ADHESIVES, a Division of CONROS CORPORATION; HENKEL CORPORATION; ROSS NORTHLAND CORPORATION d/b/a CONSUMER CHEMICAL CORPORATION; and JOHN O'BRIEN, Jointly and Severally,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Where a District Court opinion ruling Plaintiffs' state civil rights law claim preempted by Federal Labor Law renders Plaintiffs' case subject to dismissal, does the fact that Plaintiff signed a stipulation for dismissal for the sole purpose of expediting an appeal preclude Plaintiff from appealing the Order of Dismissal where the stipulation inferred, but did not expressly state that sole purpose, given the fact that this Court has never required that a stipulation for such purpose expressly so state?

RULE 28.1 LISTING

Petitioners are individuals who have no parent company, affiliate, or subsidiary.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Julius Laczay and Jolanda Laczay respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App

A, infra, 1a-10a) is reported at 840 F.2d.

The Order of the Court of Appeals denying re-hearing (App. B, infra, 11a-12a) is not reported. The memorandum opinion and order of the district court (App. C, infra, 13a-15a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 26, 1988, and a timely petition for rehearing was denied on October 11, 1988. (App. B, infra, 11a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

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1. The Facts

Plaintiff Julius Laczay was employed as a shipper by defendant and its predecessor for more than 26 years. (NR1: Complaint and Jury Demand, Count I, Para 1 and 2). Plaintiff was laid off on August 15, 1986, when he and other employees were advised, on that date, that defendant was closing

all Michigan warehouse operations. (NR 1: Complaint and Jury Demand, Count I, Para 5 and Count II, Para 2).

In exchange for payment of $320.00, plaintiff was required to sign a release of all claims. (NR 1: Complaint and Jury Demand, Count II, Para 5). Plaintiff signed the release, believing that he had no choice based upon the representation of defendant that all Michigan warehouse operations were closing. (NR 1: Complaint and Jury Demand, Count II, Para 9). It turns out that this representation was false. Shortly after plaintiff signed the release, younger people were hired by defendant for continuing warehouse operations in Michigan. (NR 1: Complaint and Jury Demand, Count I, Para 6 and Count II, Para 8).

2. Proceedings Below

When plaintiffs filed this suit in

Michigan's Wayne County Circuit Court, plaintiffs tendered back to defendant the sum of $320.00, representing the severance payment. (NR 1: Complaint and Jury Demand, Count II, Para 13). However, tender was refused and the money has been returned to plaintiffs. (NR 2: Answer, Count II, Para 13).

Defendants removed this case to federal district court. Plaintiff filed a motion to remand the action to State court, which was denied. (NR 5) On July 20, 1987, plaintiff filed a motion for reconsideration of the district court order based upon the June 9, 1987, Supreme Court decision in Caterpillar, Inc. v. Williams, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). (NR 13) That motion was also denied.

In its order denying plaintiffs' motion to remand, the district court opined that plaintiff's action "must be deemed to arise

under federal labor law." (NR 15)

Because plaintiff had not exhausted the grievance procedure or any internal union appellate remedies, and because more than six months had elapsed since termination prior to the filing of the lawsuit, plaintiff was well aware that this action of plaintiff, if deemed a §301 duty of fair representation case under federal labor law as the trial court had held, would eventually be dismissed on the basis of the statute of limitations and failure to exhaust administrative remedies. Rather than compelling defendants to file a motion under circumstances which plaintiff could not oppose anyway, plaintiff took the initiative in agreeing with defendant that this action would be dismissed, plaintiff reserving in the dismissal stipulation plaintiffs' position that the plaintiffs should be permitted to pursue state causes

of action in state court, while plaintiffs recognize that the district court had ruled against plaintiffs on this issue. (NR 17)

The complaint filed by plaintiffs is in three counts: age discrimination pursuant to state statute; fraud and misrepresentation under the state common law; and loss of consortium under state common law. On appeal plaintiffs abandoned the fraud and misrepresentation count, proceeding only on the age discrimination claim as well as the derivative loss of consortium claim.

The Sixth Circuit held that plaintiffs had waived their right to appeal by virtue of the Stipulation to Dismiss. Plaintiffs' Petition for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE SIXTH CIRCUIT AS WELL AS THE REASONS UNDERLYING THAT DECISION CONFLICT DIRECTLY WITH PRIOR DECISIONS OF THIS COURT.

In order to reach the result that plaintiffs had waived their right to appeal, the Sixth Circuit had to decide three issues contrary to clear Supreme Court authority: (1) May an employee successfully pursue a claim for breach of a collective bargaining agreement against an employer without also proving a breach of the union's duty of fair representation? This Court says yes, but the Sixth Circuit said no; (2) Is the statute of limitations in Michigan for such a claim sixth months or six years? This Court says six months, but the Sixth Circuit said six years; (3) Does the statute of limitations in an age discrimination-wrongful discharge case accrue when the employee is apprised of the

decision to discharge, or when the younger replacement is hired? This Court has answered the former, but the Sixth Circuit inferred the latter; (4) Is the exhaustion of the grievance procedure excused where the reason for discharge is pretextual? This Court would say no, but the Sixth Circuit said yes.

A. Plaintiffs' §301 Claim Was Clearly Subject To Dismissal.

Disagreeing with plaintiffs' position that the six month statute of limitations and the failure to exhaust administrative remedies barred a claim under §301, the Sixth Circuit held that plaintiff could have argued in the lower court for the application of Michigan's six year contract statute of limitations rather than accept the inevitability of dismissal. The Court reasoned that plaintiffs' claim here is a straight-forward contract claim, not a

hybrid §301 fair representation claim.

But in order for plaintiff to prevail in a breach of contract claim based on the collective bargaining agreement against the employer, the employee must show not only that the discharge was contrary to the contract, but must also establish a breach of the duty of fair representation by the union. Hines v. Anchor Motor Freight, 424 U.S. 554 (1976).

United Autoworkers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), cited by the Sixth Circuit, is inapposite because in that case: (1) the union was the plaintiff; (2) the union was a party to the contract; (3) there could hardly exist a duty of fair representation component to the claim where the union itself was plaintiff.

Plaintiff is unaware of any authority allowing an employee to sue an employer for

breach of a collective bargaining agreement unless the plaintiff also alleges breach by the union of its duty of fair representation. Indeed, if a plaintiff could sue for breach of contract regardless of whether the union fulfilled its duty, the grievance procedure would no longer enjoy the finality it now has. This is contrary to the Steelworkers Trilogy, the cornerstone of federal labor law. [1] Hence, as between an employee and his employer, any claim for breach of a collective bargaining agreement is in effect a hybrid §301 claim, regardless of whether the employee names the union as a defendant. As a hybrid §301 claim, the appropriate statute of limitations in Michigan is six

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[1] Of course, if this Court is ready to open the floodgates, an untold number of employees who have lost their grievances are waiting with bated breath, court filing fees in hand, for the opportunity to enjoy a second bite at the legal apple.

months. Del Costello v. Teamsters, 462 U.S. 151 (1983).

The Sixth Circuit also held that even if the appropriate statute of limitations is six months, the accrual of the statute of limitations may have been tolled by fraudulent misrepresentations of defendant from the date of termination, August 15, 1986, until October, 1986. Because plaintiff filed his complaint less than six months later, April 1, 1987, the Court of Appeals reasoned that the statute of limitations may not have expired.

But such reasoning ignores clear Supreme Court authority. In Delaware State College v. Ricks, 449 U.S. 250 (1980), this Court held that, in a wrongful discharge case, the statute of limitations accrues at the time the discriminatory decision is made and communicated to the plaintiff, here August 15, 1986 when plaintiff was advised

he was terminated. The fact that defendant here later committed another act, i.e., hiring a younger replacement for plaintiff, does not toll the statute of limitations.

Hence, this case was filed more than six months after the statute of limitations accrued, rendering it subject to dismissal.

The Sixth Circuit also held that the fraud alleged by plaintiff could have excused or extended the time for filing a grievance or pursuing internal union remedies. But plaintiff made no allegations of fraud against his union, and the alleged fraud of the company related only to the reason for termination, (closing of all Michigan operations), which is not unlike any pretextual reason furnished by an employer for discharge as a cover for discrimination. As such, plaintiff would have been required by the

terms of the collective bargaining agreement to file a grievance within 10 days after his termination. Even if the time was extended by the fraud to October, 1986 when defendant's Michigan warehouse operations resumed, or to December, 1986 when plaintiff learned that a younger replacement had been hired for him, plaintiff still did not file a grievance within 10 days of learning these facts. Hence, he failed to exhaust his collective bargaining agreement remedies, let alone his internal union appellate remedies, both of which are clear prerequisites to the filing of a §301 claim. Vaca v. Sipes, 386 U.S. 171 (1967)

B. Plaintiff's Only Purpose In Signing The Stipulation For Dismissal Was To Expedite Appellate Review.

Had plaintiff not prepared the stipulation at issue here, defendant would have been put to the task of establishing these

indisputable facts in discovery. Before filing the inevitable motion for summary judgment, defendant would have been required by L.C.R. 17a(1) for the U.S. District Court Eastern District of Michigan to seek plaintiffs' concurrence. Given the undisputed facts, plaintiff could hardly refuse to concur without incurring liability for sanctions under F.R.C.P. 11. Concurrence by plaintiff would have resulted in a stipulation at best very similar to the one prepared and filed here.

By approaching defendant promptly regarding the stipulation at issue after the trial court held that plaintiffs' state claims were preempted, plaintiff saved both defendant and the trial court the time and expense that otherwise would have been required to perfect summary judgment. Certainly, such conduct is exactly what Rule 11 is designed to encourage. In

addition, the Code of Professional Responsibility forbids a lawyer from knowingly advancing a claim that is unwarranted under existing law. D.R. 7-102(A)(2). Plaintiff simply had no basis for pursuing a §301 claim under federal labor law. This Court will note that plaintiff, in the Stipulation for Dismissal, continued to take the position that plaintiff should be permitted to pursue his state cause of action in state court.

In these circumstances, this Court has permitted an appeal from such a stipulated Order of Dismissal to go forward. In United States v. Proctor & Gamble, 356 U.S. 677, 2 L.Ed. 2d 1077 (1958), the Supreme Court permitted the United States to appeal a dismissal solicited by the government where the government, when it proposed the dismissal, had already lost on the merits

and was only seeking a final order so it could get an expeditious review.

In Bogorad v. Eli Lilly & Company, 768 F.2d 93 (CA 6 1985), this Court permitted a plaintiff to appeal a dismissal sought by the plaintiff where the district court had dismissed her only viable claim, even though the district court had offered to hear her case to the extent that it sounded in negligence. Under the circumstances, the Sixth Circuit held:

> "This court, in its latest treatment of this issue, has held that a similar judgment was appealable when the 'solicitation of the formal dismissal was designed only to expedite review of an order which had in effect dismissed appellant's complaint.'" Id. at 94

This is precisely the case here. The district court opinion holding plaintiffs' state claims preempted struck at the heart of plaintiffs' case and in effect rendered plaintiffs' case subject to dismissal.

Plaintiff solicited the formal dismissal only to expedite review and save the parties and the court time and expense.

Raceway Properties, Inc. v. Emprise Corp., 613 F.2d 656, (6th Cir. 1980), is right on point. In that case, the parties both filed motions for summary judgment. The trial court denied both motions, finding that summary judgment was inappropriate because genuine material fact issues existed. In its opinion, the district court indicated its finding as to the relevant market, a finding which was at odds with appellant's anti-trust theory. At that point, the appellant informed the trial court that it believed that the court's opinion effectively terminated the case because appellant was not prepared to go forward with a case based on the relevant market outlined by the court. Appellant then requested a formal order of

dismissal, which was entered.

In the Court of Appeals, the appellee contested appellant's right to appeal under these circumstances. The Sixth Circuit held:

> "We agree with appellants that the judgment below is appealable since appellants' solicitation of the formal dismissal was designed only to expedite review of an order which had in effect dismissed appellants' complaint." Id. at 657

The same situation obtains here. The district court, in its memorandum opinion, stated that plaintiffs' state law claims were preempted by federal labor law. Plaintiff was not prepared to and could not proceed with evidence establishing a violation of federal labor law. Therefore, appellants here requested a formal order of dismissal so that appellants could appeal the trial court's ruling on the issue of preemption.

Neither this Court in Proctor & Gamble,

nor the Sixth Circuit in Bogorad or Raceway Properties has ever held that the party seeking to appeal must expressly state on the record that the only purpose of stipulating to dismissal is to expedite the appeal.

No reasonable observer would suggest that such an incantation of the magic words should establish a right to appeal, where, by law, one does not exist as, for example, in the case of non-final orders. Similarly, failure to incorporate the "expedite the appeal" language in a stipulation should not bar an appeal from a final order where it is obvious that the appellant: (1) derived no strategic advantage from the stipulation; (2) expressed a desire to pursue state claims in another forum; (3) intended solely to expedite appellate review; (4) used a reasonable means to expedite the appeal, and (5) did in fact

conserve resources of the court and his opponent.

CONCLUSION

For the reasons set forth above, petitioners, Julius and Jolanda Laczay respectfully request this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment entered in this cause.

Respectfully submitted,

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APPENDICES

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 87-1886

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JULIUS LACZAY AND JOLANDA LACZAY,
Plaintiffs-Appellants,
v.
ROSS ADHESIVES, a Division of CONROS CORPORATION, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed August 26, 1988

Before: LIVELY and JONES, Circuit Judges; and BROWN, Senior Circuit Judge.

LIVELY, Circuit Judge. This appeal requires us to determine the conditions under which a party may appeal from a stipulated judgment dismissing an action. As a general rule, neither party may appeal from an agreed judgment because it is not an involuntary adverse judgment. There is an exception, however, when the appellants' "solicitation of the formal dismissal was designed only to expedite review of [a prior] order which had in effect dismissed appellants' complaint." *Raceways Properties, Inc. v. Emprise Corp.*, 613 F.2d 656, 657 (6th Cir. 1980). In this case the plaintiffs con-

tend that denial of their motion to remand the action after removal effectively dismissed it.

I.

A.

The plaintiff Julius Laczay filed suit in a Michigan court seeking damages and reinstatement to a position with Ross Adhesives, where he had worked for sixteen years before being terminated on August 15, 1986. In Count I of the complaint, Laczay charged the defendants with violating the age discrimination prohibitions of Michigan's Elliott-Larsen Civil Rights Act. In Count II the plaintiff alleged that the defendants misrepresented their intent to discontinue the Michigan operations where Laczay was employed, and fraudulently obtained a release from the plaintiff of claims against the defendants in exchange for $320. The plaintiff tendered back the payment and sought a declaration that the release was void. In Count III Jolanda Laczay sought damages for loss of consortium. Since Count III does not figure in this appeal, references to the plaintiff or Laczay will relate to Julius Laczay.

Before answering, the defendants filed a petition for removal of the action to the United States District Court for the Eastern District of Michigan. As the ground for removal the defendants asserted that the district court had original jurisdiction under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, because the release referred to in Count II was obtained pursuant to a termination agreement between the defendants and the union that represented the plaintiff. In their answer the defendants denied the operative allegations of the complaint and pled as affirmative defenses the plaintiff's failure to exhaust administrative remedies under the collective bargaining agreement between his union and employer, and the statute of limitations applicable to § 301 actions.

B.

The plaintiff filed a motion to remand, arguing that the complaint raised only state causes of action and issues that were not "inextricably intertwined" with consideration of the terms of the collective bargaining agreement. In extensive briefing the parties argued the difficult issue of when a claim by an employee against an employer is preempted by § 301 because it implicates a labor contract. In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985), the Supreme Court stated that the analysis must focus on "whether evaluation of the [state law] claim is inextricably intertwined with consideration of the terms of the labor contract."

The district court denied the motion to remand, concluding that the gravamen of the complaint was that Laczay "was terminated pursuant to an invalid termination agreement between his union and his employer." Thus, in the court's view, the plaintiff's claims were " 'inextricably intertwined' with the terms of this agreement and the negotiating process that led to . . . Laczay's execution of the release he is now challenging." The plaintiff filed a motion for reconsideration, citing a more recent Supreme Court decision, *Caterpillar, Inc. v. Williams*, _ U.S. _, 107 S. Ct. 2425 (1987), but raising no new issues. The district court found *Caterpillar* inapplicable, and denied the motion.

C.

The next docket entry of substance, after the order denying reconsideration, consists of a stipulation and order of dismissal with prejudice. These documents read as follows:

STIPULATION DISMISSING ACTION

> Plaintiffs stipulate that they have not satified [sic] the prerequisites to the bringing of an action under § 301 of the Labor Management Relations Act (i.e., exhaustion of grievance procedure and/or internal

union appeal). Plaintiffs therefore stipulate that this action may be dismissed with prejudice and without costs, it being Plaintiffs' position that Plaintiffs should be permitted to pursue state causes of action in the state court, but this Honorable court having ruled against Plaintiffs on that issue. Attached is the agreed Dismissal Order.

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ALAN B. POSNER (P27981)
Attorney for Plaintiffs

* * *

DISMISSAL ORDER

At a session of said Court held on the *28* day of *Aug.*, 1987:

* * *

Upon stipulation of the parties, it is ordered that the above captioned action is dismissed with prejudice and that each party shall bear their own fees and costs of action.

Robert DeMascio
UNITED STATES DISTRICT JUDGE

It is undisputed that counsel for the plaintiff prepared the stipulation and forwarded it to counsel for the defendant, who added the last sentence, signed it, and returned it with the order of dismissal that he had prepared. Counsel for the plaintiff then forwarded both documents to the district court, where they were entered after the district judge signed the order. The plaintiff then appealed to this court, and the defendants raised the issue of his right to appeal in their brief.

II.

A.

The Supreme Court recognized an exception to the general rule that one who voluntarily dismisses his or her complaint has no right of appeal in *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958). In *Procter & Gamble* the government refused to comply with a trial court order directing it to turn over to the defendant in a civil antitrust action certain grand jury testimony taken in a related criminal investigation that had produced no indictments. In order to avoid risking a contempt citation, the government filed a motion for the district court to amend its order to provide that if production was not made the court would dismiss the complaint. The defendant did not oppose the motion and an amended order was entered. When the government did not produce the transcripts, the district court entered an order of dismissal.

On direct appeal from the district court, the Supreme Court held that the appeal could be maintained because the government "did not consent to a judgment against [it], but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that [it] might come to this court without further delay." *Id.* at 681, quoting *Thomsen v. Cayser*, 243 U.S. 66, 83 (1917). The Court found that the United States had consistently opposed the request for grand jury materials, and "[w]hen the Government proposed dismissal for failure to obey, it had lost on the merits and was only seeking an expeditious review." *Id.* at 680-81.

At least one court has limited the application of *Procter & Gamble* to cases where the appellant faces the prospect of contempt. See *Plasterers Local Union v. Wyland Enterprises, Inc.*, 819 F.2d 217, 218-19 (9th Cir. 1987). However, this court has applied *Procter & Gamble* more broadly. In *Raceway Properties, Inc. v. Emprise Corp.*, 613 F.2d 656 (6th Cir. 1980), the district court entered an interlocutory order

holding that the relevant market in a private antitrust case was different from that claimed by the plaintiffs. The plaintiffs advised the court that they were not prepared to proceed with evidence regarding the relevant market outlined by the court and that they believed the order effectively terminated the lawsuit. The plaintiffs then requested the court to enter a formal order of dismissal so they could challenge the relevant market ruling on appeal. The order was entered, and the defendant sought dismissal of the appeal on the ground that the order was not appealable. Citing *Procter & Gamble*, this court found the order of dismissal was appealable because the appellants' "solicitation of the formal dismissal was designed only to expedite review of an order which had in effect dismissed appellants' complaint." 613 F.2d at 657.

The court reached the same result in *Bogorad v. Eli Lilly & Co.*, 768 F.2d 93 (6th Cir. 1985). In that case the plaintiff sought dismissal in the district court because she concluded that a preliminary order in her product liability case foreclosed her only viable claim. The court granted her motion after offering to hear the case on another theory. In denying the defendant's motion to dismiss the appeal, this court relied on *Procter & Gamble* and *Raceway Properties* to find that the general rule against appealing voluntarily dismissed actions did not apply.

The only case of which we are aware that involves an attempt to appeal from a voluntary dismissal following denial of a motion to remand was decided under the general rule long before the Supreme Court recognized an exception in *Procter & Gamble*. See *Kelly v. Great Atlantic & Pacific Tea Co.*, 86 F.2d 296 (4th Cir. 1936). This court followed *Kelly* in *Management Investors v. United Mine Workers*, 610 F.2d 384 (6th Cir. 1979), without citing *Procter & Gamble*. A careful reading of *Kelly* and *Management Investors* discloses that in both cases the plaintiffs sought and received dismissals *without prejudice* following trial court rulings that they felt

doomed their cases. The *Kelly* court explained its reasoning that such a dismissal is not appealable as follows:

> If plaintiff, after refusing to proceed, had not taken a voluntary nonsuit, defendant could have insisted on a verdict and judgment on the merits, which would have been determinative of the rights of the parties and would not have left plaintiff at liberty to commence another action for the same cause, as is his right under the voluntary nonsuit.

86 F.2d at 297. The court in *Management Investors* followed the same reasoning since the dismissal was without prejudice.

B.

It appears that the "no appeal from a voluntary dismissal" rule is ironclad only with respect to dismissal without prejudice. A majority of the courts of appeals that have ruled on the issue appear to accept this court's formulation in *Raceway Properties* of an exception when the dismissal is with prejudice and "designed only to expedite review" of a prior order having the effect of a dismissal. See *Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp.*, 814 F.2d 90, 94 (2d Cir. 1987); *Studstill v. Borg Warner Leasing*, 806 F.2d 1005, 1008 (11th Cir. 1986); *cf. Coughlin v. Regan*, 768 F.2d 468, 470 (1st Cir. 1985); *LeCompte v. Mr. Chip Inc.*, 528 F.2d 601, 603 (5th Cir. 1976). On the other hand, the Ninth Circuit held in *Seidman v. City of Beverly Hills*, 785 F.2d 1447, 1448 (1986), that a plaintiff who consented to the dismissal of his action with prejudice deprived the court of appeals of jurisdiction to hear his appeal. The court stated, "A plaintiff may not appeal a voluntary dismissal because it is not an involuntary adverse judgment against him." *Id.* (footnote omitted). This appears to be inconsistent with the court's statement in *Coursen v. A. H. Robins Co.*, 764 F.2d 1329, 1342 (9th Cir. 1985), as corrected in 773 F.2d 1049 (1985): "While a plaintiff cannot appeal a voluntary dismissal without preju-

dice, he or she may appeal a dismissal with prejudice." At any rate, this court appears to be firmly committed to recognizing the exception in proper cases when the dismissal is with prejudice.

III.

Since ordinarily a party who consents to entry of a judgment has no right to appeal, one who seeks to come within an exception to this rule should make his or her intention known to the court and opposing parties. As the court stated in *Coughlin v. Regan*, "While it is possible for a party to consent to a judgment and still preserve his right to appeal, he must reserve that right unequivocally, as it will not be presumed." 768 F.2d at 470.

It is manifest from the text of the Supreme Court opinion in *Procter & Gamble* that the government did make it clear to the district court and to the defendant that it requested a final order of dismissal solely for the purpose of expediting an appeal. The same is true with respect to this court's opinion in *Raceway Properties*, where the court wrote that "[t]he appellants requested a formal order of dismissal so that they could proceed with an appeal challenging the district court's ruling on the scope of the relevant market." 613 F.2d at 657. While the brief discussion of the issue in *Bogorad* does not make the point as directly, it is there by implication. The court's opinion states that the district court had offered to proceed on a second theory after closing the door on the plaintiff's preferred theory. Thus, there was discussion of alternatives before the plaintiff sought a final order "designed only to expedite review." 768 F.2d at 94.

IV.

Since the solicited dismissal in this case was with prejudice, we must determine whether the present case comes within the exception. We conclude it does not, and find the course followed by the plaintiff troubling in several respects. The

basic requirement for appealability of a consent judgment is that the one proposing or soliciting it shall have "lost on the merits and [be] only seeking an expeditious review." *Procter & Gamble*, 356 U.S. at 681. It is not at all clear that Laczay had lost on the merits when the district court denied his motion to remand to the state court. In the stipulation for dismissal the plaintiff stated that he had not satisfied the requirement of a § 301 action that there be an exhaustion of grievance procedures or internal union remedies. In his reply brief, the plaintiff added as a second reason for considering his case a lost cause under § 301 that it would have been barred by the six-month statute of limitations for § 301 actions prescribed by the Supreme Court in *Del Costello v. Teamsters*, 462 U.S. 151 (1983).

These contentions overlook several important facts. In Count II the plaintiff pled fraudulent misrepresentations by the defendants which, if proved, might have excused, or at least extended the time for pursuing internal remedies until the fraud was discovered. The complaint stated that "since approximately October 1986 or earlier" the defendants continued to carry on operations that they had represented to the plaintiff were being discontinued. If the plaintiff would have reasonably discovered this alleged misrepresentation in October 1986, his complaint filed April 1, 1987, arguably would have been within the six-month limitations period of *Del Costello*. Beyond that, however, the plaintiff's action is a "straightforward" § 301 contract action, not a "hybrid § 301/fair representation claim" against his employer and his union. *Del Costello* involved a hybrid action, and it is not at all clear that the six-month limitations period prescribed for such actions applies to all contract actions by an employee against an employer. In these "straightforward" cases, *United Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), requires application of the most analogous state statute of limitations. This is evident from the limiting language of *Del Costello* that "resort to state law remains the norm for bor-

rowing of limitations periods." 462 U.S. at 171. For these reasons, it cannot be said with certainty that the plaintiff had finally lost on the merits once his case was deemed a § 301 action.

At oral argument counsel for the plaintiff said he was abandoning the fraud claim. However, he could have tendered an amendment to the district court deleting Count II after the court ruled on his motion to remand. Then the district court would have had an opportunity to reconsider the remand question in the light of a complaint charging nothing but an age discrimination violation under the state civil rights act. Instead, the plaintiff stipulated for dismissal and filed a notice of appeal.

Under all of these circumstances we do not believe this is an appropriate case for an appeal from a dismissal entered at the behest of the party now seeking to appeal. It was incumbent upon the plaintiff to determine by careful analysis whether the prior ruling of the court actually did have the effect of a final adverse judgment on the merits. If such a determination was made, he then had the responsibility to inform the court and opposing parties that he was seeking a final order of dismissal with prejudice for the sole purpose of obtaining an expeditious review of the prior order, and of reserving that right unequivocally in the stipulation or the order. Having done none of these things, the plaintiff did not preserve a right of appeal.

The appeal is dismissed at the plaintiff-appellant's cost.

No. 87-1886

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JULIUS LACZAY, ET AL.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	ORDER
v.	)	
	)	
ROSS ADHESIVES, A DIVISION OF CONROSS CORPORATION, ET AL.,	)	
	)	
Defendants-Appellees	)	

BEFORE: LIVELY and JONES, Circuit Judges and BROWN, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JULIUS LACZAY, et al.,

Plaintiffs,

v.

ROSS ADHESIVES, a Division of Conros Corporation, et al.,

Defendants.
_____/

Civil No. 87CV71574DT

Hon. Robert E. DeMascio

ORDER

This matter is before the court on plaintiffs' motion to remand this action to Wayne County Circuit Court as improvidently removed. Plaintiffs filed this action in state court alleging claims for age discrimination in violation of Michigan's Elliott-Larsen Act, fraud and misrepresentation under Michigan common law, and loss of consortium under state law. Defendants have filed a petition for removal arguing that plaintiffs' state law claims are preempted by Section 301 of the Labor Management Relations Act. 29 U.S.C. § 185. For the reasons stated herein, we

find that this court has subject matter jurisdiction over this cause of action and therefore deny plaintiffs' motion to remand.

While plaintiffs' complaint purports to state claims under state statutory and tort law, we think it clear that the gravamanof the complaint is that plaintiff was terminated pursuant to an invalid termination agreement between his union and his employer. No matter how couched, plaintiff's claims are certainly "inextricably intertwined" with the terms of this agreement and the negotiating process that led to plaintiff Julius Laczay's execution of the release he is now challenging. See Allis-Chalmers v Lueck, 105 S.Ct. 1904, 1912. As federal labor law clearly governs the interpretation of the termination agreement, and as plaintiffs' claims clearly overlap with this agreement, we find that this action must be deemed to arise under federal labor law. See McCulley v. Ford Motor Company, No. 86-4821, slip op. at 3 (E.D. Mich. March 26, 1987).

Civ. #87CV71574DT

NOW, THEREFORE, IT IS ORDERED that plaintiffs' motion to remand be and the same hereby is DENIED.

_____
Robert E. DeMascio
United States District Judge

Dated: July 16, 1987